United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

75-7550, 7607, 7617 2-13

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

REX-NORECO, INC.,

Plaintiff-Appellee-Appellant,

v.

ISIDORE GOODSTEIN, PARKSVILLE MOBILE MODULAR HOMES, INC. and ADAM FILIPOWSKI,

Defendants-Appellants-Appellees

APPEAL IN FORMA PAUPERIS

BRIEF OF DEFENDANT GOODSTEIN-APPELLANT-APPELLEE and JOINT BRIEF OF ALL DEFENDANTS-APPELLANTS-APPELLEES WITH RESPECT TO POINT III

REPLY BRIEF

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POINT I

THE FORFEITURE PROVISION OF PLAINTIFF'S PENSION AND PROFIT SHARING PLANS ARE AS A MATTER OF LAW UNENFORCEABLE BY REASON OF THE CONCESSIONS CONTAINED IN PLAINTIFFSS REPLY BRIEF. IN ANY EVENT EVEN IF ENFORCEABLE, SUCH PROVISIONS WERE NEVER VIOLATED BY DEFENDANT GOODSTEIN.

Plaintiff in its reply brief concedes that the alleged forfeiture clause was not intended as a good faith effort to estimate actual damages which might flow from the conduct of any employee. Plaintiff rather contends that there is no such requirement. (See Page 2 et seq. of plaintiff's reply brief. On Pages 27 and 28 of defendant's joint brief, ample citation was given for the proposition that a forfeiture clause or a liquidated damage clause or by whatever other name it might be called, must comply with the rule of reasonableness. Furthermore on Pages 32 through 36 of this brief, defendants discussed in some detail the holding of this Court in the case of Bradford v. New York Times Company 501 F .2d 51 (2d Cir. 1974). This Court in Bradford, supra, on Page 57 specifically held that a restraint upon a former employee must be measured in the context of reasonableness and the Court specifically rejected any authorities as representing the law of this State which precluded any inquiry into reasonableness.

Plaintiff attempts to circumvent this rule by referring to a hypothetical case of a police officer who, over a period of several years, accepts a series of small bribes. What

plaintiff is trying to do is equate defendant Goodstein's acts with the acts of a hypothetical police officer or Internal Revenue Service agent who accepts bribes. This is a truly shameful analogy. There is no suggestion anywhere in the record that defendant Goodstein ever engaged in any conduct remotely resembling the acceptance of a bribe. His so called "improper" acts consisted of making unauthorized telephone calls and in taking preliminary steps in setting up a non competing business with his former employer. These acts consisted merely of having his attorney form a corporation which never conducted any business until almost three months after Goodstein's employment with the plaintiff terminated and in taking such other preliminary steps as obtaining insurance and a lease. To compare this to a public official who betrays his public trust by accepting bribes is really too preposterous to comment on in any great detail.

Interestingly, now that the plaintiff has raised this rather absurd comparison, this Court's attention is directed to the case of Hadden v. Consolidated Edison Company of New York, Inc. 34 N.Y. 2d 88 (1974). The Court held in that case that the employee, Hadden concealed the fact from his employer, Consolidated Edison, that in December 1967, Hadden had participated in a meeting with a prominent political leader and a Consolidated Edison contractor where it was suggested that in return for a bribe to an appropriate New York City

official, Consolidated Edison could obtain a valuable license.

He concealed from his employer this bribe approach and thereafter terminated his employment. Consolidated Edison attempted to revoke his pension based on his disloyalty. The Court held that Consolidated Edison could not revoke his pension. The Court held that a pension is not a pure gratuity, but rather a deferred portion of the compensation earned for services previously rendered and that although the Court could not condone the employee's action in the latter part of his career in concealing a bribe, the Court found that looking at the employee's career as a whole, he had substantially performed, and that his latter disloyalty of a rather serious nature, could not be the basis for the forfeiture of a pension.

Furthermore in the Hadden case, supra, the pension plan of the employer, provided, as is the case here, that if the employee was discharged for cause, his pension could be forfeited. As the case here, the employer did not discover the "grounds for cause" until after the discharge and the employer in that case made the same argument as here, namely, that if they had known about the activities of the employee, they would have discharged him. The employer there, argued as here, that the employee should not benefit merely because the grounds for discharge were not discovered until after the employee terminated his employment. The Court in Hadden, supra, as the Trial Court below, held that the employer admittedly not having discharged the employee, could not be heard to argue that if he would have known, he would have discharged the employee and that therefore

the forfeiture was proper. The Court stated on Page 98 as follows:

> "If the parties to the Pension Plan herein wanted pension benefits to be adversely affected when an employee's misconduct comes to light after his retirement, rules covering the Company's and the employee's rights in such a situation should properly have been covered by provisions in the Plan".

The Court rejected the employer's argument despite the fact there was a provision in the plan authorizing the Trustees to interpret the Plan and make rules and regulations for its administration.

It is Hornbook law that penalty clauses are to be strictly construed against the party seeking forfeiture.

In any event, it is clear that assuming the forfeiture clause is enforceable, Goodstein never violated it. Plaintiff admits that Goodstein never gave away trade secrets. With regard to where Goodstein violated the forfeiture clause by improper competition with the plaintiff, reference is made to Point II and defendants' reply brief.

POINT II

PLAINTIFF IS NOT ENTITLED TO THE SUM OF $3816.02 REPRESENTING MOVING EXPENSES, SEVERANCE PAY AND UNAUTHORIZED PHONE CALLS BY REASON OF PLAINTIFF'S FAILURE TO SUE FOR SAME AS ADMITTED BY PLAINTIFF'S REPLY BRIEF.

Plaintiff's reply brief concedes that the Federal Rules of Civil Procedure, Rules 8 (a) and 9 (b) require the plaintiff to give the defendant in its complaint reasonable and fair notice of the transactions or occurrences upon which its claim is based, and must provide greater detail when the claim is based either on fraud or mistake as here.

Plaintiff's only rejoinder is that it is not required to set forth every item in "precise detail." Plaintiff not only did not give the precise details of these claims, it gave no details. In fact plaintiff made no claim whatever for any of these items anywhere in its complaint or amended complaint. Defendant in his brief on appeal analyzed plaintiff's complaint in great detail to demonstrate the total lack of any claim or notice of any claim of these items. Defendant challenged the plaintiff to point out in its reply brief where in plaintiff's complaint any notice however remote was made of these claims. Plaintiff failed to make any response other than the flip remark that its complaint need not give the "precise" details of its lawsuit.

The other argument offered by plaintiff in this regard is that defendant waived any objection in plaintiff's pleadings

by failing to object to the offer of proof of these items. Plaintiff then gratuitously adds that if it were really necessary it could have made a motion to conform the pleadings to the proof and then apparently speaking for Judge Lasker such motion would have been granted. Defendant in his brief points out on Page 49 thereof that "proof" of defendant's unauthorized phone calls ($350.00) and improper receipt of severance pay ($1466.02) and travel expenses ($2000.00) were offered by plaintiff <u>solely</u> for the purpose of showing that defendant Goodstein violated the "forfeiture" provisions of plaintiff's Pension and Profit Sharing Plans. Judge Lasker clearly understood that this offer by plaintiff was solely for the purpose of taking advantage of its forfeiture clause. These items were offered solely as proof of defendant's "disloyalty" or breach of his "fiduciary duty" in attempt by plaintiff to bring itself within the ambit of its own forfeiture provisions (app. 416, par 7; 417 par 3; 489-490). Judge Lasker recognized this when he stated in substance in his opinion dated March 24, 1975, that if the forfeiture clause was otherwise enforceable that proof of the damages in the sum of $3816.02 would entitle plaintiff to return of the $15,041.00 paid to defendant for accrued pension monies (app. 416). The Court never held or suggested that plaintiff was even making a claim for <u>both</u> the return of the pension monies and the sum of $3816.02. The Court held that if the forfeiture clause was enforceable the proof of damages of $3816.02 would entitle plaintiff solely to the return of the

$15,041.00 in pension monies. This clearly confirms that plaintiff's "offer of proof" was for the limited purpose of obtaining a return of the pension monies which was specifically sued for by plaintiff and not for any other purpose. The Court's error was its finding that since the forfeiture clause was unenforceable plaintiff must be entitled to some damages even if not claimed and thus alternatively awarded plaintiff the sum of $3816.02 (app. 416 489-92).

Plaintiff, to remain consistent, must make the argument that it is entitled to both return of the pension monies and the sum of $3816.02 for the phone calls, severance pay and moving expenses even though the record clearly indicates that no details of these claims, "precise" or otherwise, were made in plaintiff's complaint and that proof of these items was offered and accepted by the Trial Court for the limited purpose of having these items establish the violation by defendant Goodstein of the "forfeiture" clause so as to enable the plaintiff to get back the pension monies paid to defendant. The very specific allegations in plaintiff's complaint seeking return of pension monies and the total absence in the complaint of any of these other items conclusively establishes that plaintiff not only never sued for these items, but never intended to sue for them.

Only after the Court mistakenly held that the $15,041.00 and $3816.02 items were somehow alternative claims of relief, namely, if plaintiff couldn't get the $15,041.00 because the forfeiture clause was unenforceable then it was entitled to these

other items, did the plaintiff glean onto this sop thrown to it by the Trial Court upon the apparent theory that a quarter loaf is better than nothing.

POINT III

DEFENDANTS ARE NOT GUILTY OF CONTEMPT BECAUSE THEY DID NOT VIOLATE THE COURT ORDER OF MAY 20, 1974.

Defendants in their joint brief argued that they did not violate the preliminary injunction dated May 20, 1974, and therefore could not be held in contempt. The Court by order dated November 7, 1974, found the defendant "Parksville" only guilty of contempt and fined it the sum of $2070.30, representing attorneys' fees and disbursements. Subsequently, by Court order June 10, 1975, the Court found all the defendants guilty of contempt and fined them jointly and severally the sum of $1000.00 for attorneys' fees and disbursements. The first amount has been paid, the latter fine has not been paid, but is secured by a $4000.00 bond in addition to the appeal bond securing the judgment.

Among the arguments made by defendants in their joint brief was that the order of May 20,1974 temporarily enjoining the defendants "Goodstein" and "Parksville" was never violated by any of the defendants because (a) by operation of law the Court order only prohibited sales of competitive mobile homes and (b) the Court below found that defendants never competed with plaintiff.

Plaintiff's response is most curious. Plaintiff apparently is arguing that the Court order of May 20, 1974 did not enjoin defendants from merely competitive sales of mobile homes whether competitive or not. Alternatively, plaintiff argues that in any event plaintiff and defendants were

competitive and the reason why the Court vacated its temporary injunction was because of a failure of showing irreparable injury rather than any lack of competition. Both arguments are totally without merit.

The temporary injunction was based solely on the restrictive covenant signed by defendant Goodstein (exh. 12 and 12a, app. 211-217). The restrictive covenant prohibited the defendant from "competing" or engaging in a "similar" business with plaintiff. Plaintiff's restrictive covenant provided in relevant part that "the employee agrees that on the termination of its (sic) employment... he will not for two years thereafter engage, in any business or employment similar to or competitive with the business of the Employer..." (emphasis supplied, app. 213, par. 3).

The temporary injunction, being based on the restrictive covenant, by operation of law, irrespective of the literal language of the order, was limited to enjoining the defendants from selling mobile homes that competed with the plaintiff. The failure of the Court to use more precise language in its order limiting the temporary injunction to "competitive" mobile homes was undoubtedly occasioned by the perjurious affidavit of Mark A. Salitan sworn to April 25, 1974 which deliberately created the false impression that plaintiff sold new and used mobile homes of all sizes, models, etc. The point really shouldn't have to be belabored that a temporary injunction can no more prohibit defendants from selling non-competitive mobile homes from plaintiff than it could in

enjoining the defendants from engaging in a totally different business than the plaintiff.

The argument by plaintiff that in any event defendants did compete with plaintiff is without any support. How the plaintiff, who for purposes of this appeal has conceded the correctness of all the findings of the Court below, can argue, in the face of the clear language of the Trial Court that plaintiff and defendants were <u>not</u> competitive, that the Court found the parties were competitive, is incomprehensible. Judge Lasker unequivocally stated the parties were not competitive. The language of his opinion dated April 14, 1975 is quoted once again.

> "There is no evidence of record to suggest that Rex would have made any, much less all, of the seventeen sales made by Parksville in violation of the preliminary injunction. It was established at trial, and we have found, that plaintiff's products (which are exclusively refurbished units) compete with those offered by Parksville to the extent that Parksville offers similar units taken as trade-ins, or factory new units similarly priced to "like-new" refurbished units offered by plaintiff--those less than three years old. (See Memorandum dated March 24, 1975, Findings of Fact Nos. 32, 33). <u>No inference can be drawn that Parksville diverted sales from Rex unless Parksville sold units competitive with those offered by Rex during the relevant period from June 1, 1974 to October 31, 1974. The record clearly does not support the inference.</u> All seventeen of Parksville's sales were factory new units; sixteen of these were fourteen foot wide units, and one was twelve feet wide. Rex's refurbished homes are all ten or twelve feet wide. Moreover, the inventory records for Rex's Loch Sheldrake location for the period June 1, 1974 to October 31, 1974 show that during that period Rex had for sale only three units less than three years old which remained unsold at the end of October. (See Plaintiff's Exhibit 55.) At most,

therefore, Parksville could have diverted only these three sales from Rex, rather than the seventeen claimed.

"These facts, coupled with the existence of a large number of competitors of Rex, require a finding that Parksville's sales were not at Rex's expense and accordingly Rex is not entitled to compensatory damages.[2]" (Emphasis supplied) (app. 451-2).

The Court's attention is further directed to Pages 21-24 of defendants joint brief on appeal wherein the lack of competition is further documented.

The affidavit of Doris Oelbaum dated April 25, 1974 and the exhibit annexed thereto (app. p. 63-103) shows that at the time immediately before the injunction was granted, plaintiff's subsidiary, Loch Sheldrake, Inc., the location plaintiff claimed defendants were competing with, had only twenty two sales. All these sales were for used, repossessed refurbished mobile homes while defendants' inventory was solely factory new mobile homes selling at a substantially higher price than plaintiff's product. Of these twenty-two sales, the break-down by year is as follows: 1964 - 1; 1965 - 1; 1966 - 4; 1967 - 3; 1968 - 2; 1969 - 3; 1970 - 5; 1971 - 2; 1972 - 1; Total 22. Eleven were 1968 or older. Only one was a 1972 and two were 1971. All were used. Not one of these mobile homes was competitive with defendants' homes and the Court so found. Even by plaintiff's contrived testimony at Trial that three year old refurbished mobile homes were partially competitive with factory new mobile homes, only about 10% of plaintiff's inventory fell into this category.

The Court did not accept plaintiff's view of competitiveness of its few three year old mobile homes with defendants' factory new mobile homes but in any event added that plaintiff sustained no damages on these two or three sales even assuming partial competitiveness because of the many other competitors in the area (app. p. 451-452). Plaintiff has attempted to latch onto this almost parenthetical language to suggest that it is the basis of the Court's decision rather than the plain thrust of its holding i.e. lack of competitiveness. Furthermore, the Court found the defendants to be non-competitive because defendants sold only much larger models than plaintiffs at a considerably higher price. (app. 347-9, p. 452). The only sales of recent models at plaintiff's Loch Sheldrake location were <u>not</u> those of <u>plaintiff</u> but rather those of Ramad Sales Corp., a supposedly unrelated corporation to plaintiff which plaintiff brought onto its Loch Sheldrake lot to sell mobile homes. The fact that plaintiff voluntarily brought "Ramad" onto its own lot to sell mobile homes undoubtedly gave the Court a fairly good idea of the motive and good faith of plaintiff in allowing and encouraging "Ramad" to "compete" with it while at the same time seeking to enjoin defendants from activities ultimately found to be non-competitive. In fact the work sheets attached to the affidavit of Doris Oelbaum sworn to April 25, 1974 previously referred to show that <u>all</u> the mobile homes on the lot of a recent vintage belonged to

"Ramad" and not to plaintiff's subsidiary, "Loch Sheldrake." See the notation on each work sheet near the top of the page next to word "dealer". The fact that the Court on its motion vacated its award of $2455.00 for damages set forth in its order of November 7, 1974 and decision dated December 31, 1974, conclusively establishes that plaintiff and defendants were found to be non-competitive. (app. p. 451-453).

As the Court found, plaintiff and defendants to be non-competitive, defendants did not violate the Court order of May 20, 1974. By reason of the foregoing, defendants cannot as a matter of law be guilty of civil contempt.

CONCLUSION

Plaintiff's cross-appeal should be dismissed, the orders of contempt dated November 7, 1974 and June 10, 1975 awarding counsel fees should be vacated and the sum of $2070.30 paid on account of the Court order of November 7, 1974, be remitted to the defendant, "Parksville", and that portion of the judgment dated June 10,1975 awarding $3816.02 to the plaintiff against Goodstein reversed and vacated.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF NEW YORK

Sally Goldberg being sworn, says:
I am not a party to this action; I am over 18 years

of age; I reside at 1401 - 52nd Street
Brooklyn, N. Y.

On February 11, 1976 I served the within Reply BRIEF
Appeal in Forma Pauperis
upon Finley, Kumble, Heine
Underberg & Grutman
and John F. Martin and Co-Defendant
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the attorney(s) for Plaintiff in this
action, at 477 Madison Avenue
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342 Madison Avenue, N. Y.
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

Sally Goldberg

Type or Print Name Below Signature
Sally Goldberg

Sworn to before me

this 13 day of February 1976

Clark Ann

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